(L)

No. 92-1460

In the Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA WATERS, ET AL., PETITIONERS

v.

CHERYL R. CHURCHILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a public employer violates an employee's First Amendment rights when it fires the employee based on reports that the employee engaged in insubordinate speech involving purely personal matters.

2. Whether the individual petitioners are entitled to qualified immunity for their role in respondent Churchill's discharge.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1450

CYNTHIA WATERS, ET AL., PETITIONERS

v.

CHERYL R. CHURCHILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The questions presented in this case concern the First Amendment rights of public employees and the individual liability of public officials for alleged violations of those rights. As the nation's largest public employer,[1] the United States has a substantial interest in both questions.

---

[1] See U.S. Dep't of Commerce, Economics and Statistics Administration, Bureau of the Census, *Statistical Abstract of the United States: 1992*, at 305 (112th ed.) (reporting 3.1 million federal civilian employees).

STATEMENT

Petitioner McDonough District Hospital, a municipal hospital in Macomb, Illinois, fired respondent Cheryl Churchill, a nurse in the hospital's obsetetrics department, because of a conversation she had at work with a fellow nurse. The conversation, as reported to hospital officials by a third person who overheard it and by the nurse to whom Churchill had spoken, involved criticism of Churchill's superiors and the way in which the obstetrics department was run. After Churchill was fired, she sued the hospital and several of its officials in federal court under 42 U.S.C. 1983, claiming that her discharge violated the First Amendment. The district court granted summary judgment in favor of the defendants (petitioners here). The Seventh Circuit reversed and remanded.

1. Churchill began working at McDonough District Hospital in October 1982; she was assigned to the obstetrics department of the hospital and remained there until she was discharged in January 1987. In April 1986, the hospital hired petitioner Kathleen Davis as the Vice-President of Nursing. Soon thereafter, Davis instituted a "cross-training" policy, under which nurses from one department could work in another department when the department to which they were usually assigned was overstaffed. "The institution of this new policy * * * trigger[ed] a certain amount of controversy and discussion among medical and nursing staff." Pet. App. 32; see also *id.* at 1-3.

One critic of the cross-training policy was Churchill. She complained about it to, among other people, Davis and petitioner Cynthia Waters, the Supervisor of Nursing in the obstetrics department and Churchill's immediate boss. See Resp. C.A. App. 52-53. Churchill believed that the policy threatened

patient care because it was designed not to train nurses, but to cover staff shortages. Pet. App. 3.

Another critic of the cross-training policy was respondent Thomas Koch, M.D., the clinical head of the obstetrics department. Even before the policy was initiated, Koch and the hospital had been involved in a staffing dispute. Specifically, in 1982, Koch had blamed understaffing in the obstetrics department for a baby's being stillborn. Respondents Koch and Churchill later became allies in their criticism of the cross-training policy. Pet. App. 3-4.

In August 1986, Dr. Koch instituted a "code pink" in the delivery room of the obstetrics department to perform an emergency Caesarean section. He initially instructed Mary Lou Ballew, a probationary employee, to help him alert other hospital personnel to the emergency. Because Ballew failed to follow the necessary procedures, Koch had to do so himself, aided by Churchill. Before the "code pink" ended, Waters came into the delivery room and told Churchill to go check on a patient. In response, Churchill said to Waters something like "You don't have to tell me how to do my job." Dr. Koch later reproved Waters for sending Churchill out of the delivery room while the code pink was still in effect. Waters, in turn, issued a written warning to Churchill based on her "insubor'inate[e]" remark to Waters. Pet. App. 4-5, 32-33.

In December 1986, Churchill received a written evaluation from Waters stating that Churchill's attitude toward Waters "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." Pet. App. 6. The evaluation also stated that Churchill "exhibits negative behavior towards me [*i.e.*, Waters] and my leadership through her actions

and body language." *Id.* at 2. The evaluation indicated that Churchill's work was otherwise satisfactory. See Resp. C.A. App. 136-140.

The conversation that precipitated Churchill's discharge occurred on January 16, 1987. On that date, Churchill had a 20-minute discussion with Melanie Perkins-Graham, a cross-trainee who was considering transferring to the obstetrics department. The conversation took place in the "break-room" where the nurses in the department ate dinner. According to Churchill, the conversation primarily concerned the cross-training policy. In addition to criticizing the policy, however, Churchill criticized Kathy Davis, saying that her staffing policies threatened to "ruin" the hospital because they "seemed to be impeding nursing care." Pet. App. 6. When Perkins-Graham said that Waters had a reputation for being difficult to work with, Churchill said (according to Churchill) that Waters was merely moody at times because of her job. *Id.* at 8.

Part of the conversation was overheard by Mary Lou Ballew while standing at the nurses' station next to the break-room. A few days later, on January 22, 1987, Ballew reported to Waters (according to Waters' notes) that Churchill took "the cross trainee into the kitchen for a period of at least 20 minutes to talk about [Waters] and how bad things are in OB [obstetrics] in general." Pet. App. 6 (quoting Waters' notes, reproduced at C.A. Supp. App. 67); see also C.A. Supp. App. 60 (deposition of Ballew) ("I told [Waters] * * * that we had had a cross-trainer down and [Churchill] had talked to her about the problems in the department to the point where the cross-trainer wasn't interested in working here any more.").

On January 23, 1987 (again according to Waters' notes), Waters told Davis what Ballew had reported. C.A. Supp. App. 220. Davis and Waters met with Perkins-Graham to confirm the report. During that meeting, Perkins-Graham "stated that [Churchill] had indeed said unkind and inappropriate negative things about Cindy Waters." C.A. Supp. App. 228 (Waters' notes). Perkins-Graham also said that Churchill claimed to have told Waters everything Churchill was saying to Perkins-Graham. *Ibid.* According to Perkins-Graham, Churchill said that Waters had discussed Churchill's evaluation with her, and that Waters "wanted to wipe the slate clean * * * but [Churchill said to Perkins-Graham that] this wasn't possible." *Ibid.* Further, Churchill told Perkins-Graham "that just in general things were not good in OB and hospital administration was responsible." Churchill specifically mentioned Davis, stating that Davis "was ruining MPH." *Id.* at 229. At the end of the meeting, Perkins-Graham told Waters and Davis that "she [Perkins-Graham] knew that we [Waters and Davis] could not tolerate that kind of negativism." *Ibid.*

On January 26, 1987 (still according to Waters' notes), Waters met with Ballew a second time "for confirmation" of Ballew's initial report. C.A. Supp. App. 67. On this second occasion, "[Ballew] stated [Churchill] was knocking the department. * * * [Ballew] said just in general [Churchill] was saying what a bad place this is to work (meaning OB)." *Id.* at 67-68. In addition, Ballew "[s]aid she heard [Churchill] state [Waters] was trying to find reasons to fire her." *Id.* at 67. Ballew also reported that Churchill described a patient complaint for which Waters had wrongly blamed Churchill. *Id.* at 67-68.

Also on January 26, 1987, Davis reported to petitioner Stephen Hopper, president of the hospital, that "a staff person in OB became upset when she heard Cheryl [Churchill] tearing down the department." C.A. Supp. App. 79 (deposition of Davis); see also *id.* at 109-112, 124-137 (deposition of Hopper). Hopper decided that Churchill should be fired, based upon Davis's report and Waters' notes of her meetings with Ballew and Perkins-Graham. *Id.* at 108 (deposition of Hopper).

On January 27, 1987, Waters and Davis met Churchill as she was coming into work and told her that she was fired. According to Churchill's contemporaneous notes, Davis said:

> [I]t had recently been brought to [Davis's] attention that [Churchill] was continuing to exhibit negative behavior in the department and that [Churchill] had been reported by someone to have had a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift. [Davis] declined to identify the date of the incident, or the name of the person with whom [Churchill] was supposed to have talked even though [Churchill] asked her. [Davis] replied by telling [Churchill] that [Churchill's] conversation was reported as being non-supportive of the department and of its administrative leadership. Because of that, [Davis] said [to Churchill], "We are going to have to terminate you."

C.A. Supp. App. 41. Churchill responded by "voic-[ing] some of [her] concerns * * * about the inadequate staffing in O.B. and [saying that she] thought they were more interested in correct number coverage rather than skilled coverage. * * * At that point [Davis] interrupted [Churchill] by saying that if that were the case then [Churchill] should have been talking to [Waters] and [Davis] about it. [Churchill] informed [Waters and Davis] that [she] had talked to [Waters] about it before." *Id.* at 42 (Churchill's notes). Compare *id.* at 81 (deposition of Davis) ("I basically advised Cheryl [Churchill] that she was overheard * * * with the disparaging remarks * * * her disparaging remarks in tearing down the department"; Davis told Churchill that she was being fired because of "her general insubordination, her general attitude and her tearing down the department, her just negative influence on the department.").

Churchill filed a grievance with Hopper and met with him on February 6, 1987. According to Churchill's notes on the meeting, Hopper asked her to discuss (1) the "code pink" incident; (2) the December 1986 evaluation in which Waters made negative comments about Churchill's attitude; and (3) "the incident regarding [Churchill's] talking about [Waters] and [Davis], with negative overtones one evening while working in OB with a cross-trainee." Pet. App. 75. "Before discussing the specifics that Mr. Hopper outlined, [Churchill] voiced some of [her] concerns regarding the cross-trainee program * * *. Hopper just looked at [Churchill] and said he didn't want to get into that." *Id.* at 75-76. Then Churchill discussed the "code pink" incident. *Id.* at 76. Hopper ended the meeting by telling Churchill that he would review the matter. *Id.* at 77. He later sent her a letter denying her grievance. C.A. Supp. App. 48.

2. Churchill filed this action under 42 U.S.C. 1983 in the United States District Court for the Central District of Illinois against the hospital, Hopper, Davis, and Waters (petitioners here). Counts 1 and 3 of her complaint alleged that petitioners fired her in retaliation for her exercise of First Amendment rights. Count 2 claimed that the individual petitioners had deprived her of due process, and Count 4 alleged a state-law breach of contract claim against the hospital. Churchill later filed an amended complaint adding respondent Koch as a co-plaintiff and adding a fifth count, which alleged that petitioners violated the First Amendment associational rights of Churchill and Koch. Resp. C.A. App. 1-21.

In February 1990, the district court granted summary judgment in favor of petitioners on Counts 2 and 4, the due process and state-law claims. Pet. App. 51-74. With respect to the due process claim, the court held that Churchill lacked a protected property interest in continued employment and, in the alternative, that petitioners' alleged deviation from procedures that Churchill conceded satisfied due process was not cognizable under 42 U.S.C. 1983. *Id.* at 70, 72. As for the state-law claim, the court held that the employee handbook on which Churchill relied did not create contract rights. *Id.* at 73. Churchill did not appeal those holdings.

In May 1991, the district court dismissed Count 5 and granted summary judgment for petitioners on Counts 1 and 3. Pet. App. 31-50. The court held that Churchill failed to state a claim in Count 5 because the right of "expressive association" upon which she relied "is not implicated when," as here, it is alleged only that "two persons simply hold common beliefs"; plaintiffs asserting such a right are required to allege that they "join[ed] together 'for the purpose of' expressing those shared views." *Id.* at 42. The court further held that, under any of the various accounts of Churchill's conversation with Perkins-Graham, the conversation was not protected because it was "an attempt to simply air personal grievances rather than to speak out on an issue of public concern." *Id.* at 45. In any event, the court determined, even if aspects of Churchill's conversation were protected, the conversation was also "inherently disruptive * * * and justified termination." *Id.* at 49.

3. The court of appeals reversed and remanded. Pet. App. 1-29. It held, first, that "Churchill's speech is a matter of public concern when viewed in the light most favorable to [Churchill]." Pet. App. 1. It explained that "according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies * * * that endangered the quality of patient care, an issue that is most certainly a matter of public concern." *Id.* at 11.

The court next addressed petitioners' argument that they could not be held responsible for violating Churchill's First Amendment rights because they were unaware of the details of the conversation that assertedly rendered it protected. Petitioners relied on *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977), which held that a public employee alleging First Amendment retaliation must "show that [the employee's] conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' "—in the employer's decision to fire or discipline the employee. The court rejected petitioners' argument. In the court's view,

under *Mt. Healthy*, petitioners' knowledge of the precise content of Churchill's conversation with Perkins-Graham was irrelevant:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing * * *.

Pet. App. 25.

Finally, the court held that the individual petitioners are not entitled to qualified immunity. The court reasoned that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern in connection with their workplace." Pet. App. 27. The court considered it "immaterial" that the individual petitioners "were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." *Ibid.* The court concluded that "[i]gnorance of the nature of the employee's speech * * * is inadequate to insulate officials from a § 1983 action." *Ibid.*

4. A petition for rehearing with a suggestion of rehearing en banc was denied. Pet. App. 30.

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in holding that it was irrelevant whether petitioners knew that respondent Churchill's conversation involved a matter of public concern. If petitioners did not know that Churchill had engaged in protected speech, they could not have fired her because of the fact she had engaged in protected speech. If they did not fire her because she had engaged in protected speech, they did not violate her rights under the First Amendment.

B. 1. The court of appeals also erred in suggesting that a public employer has a duty under the First Amendment to investigate the details of an employee's conversation before it fires her based on reports of that conversation. An employer does not violate the First Amendment when it fires an employee in the mistaken belief that the employee has engaged in insubordinate speech involving purely personal matters. It is irrelevant whether that mistake is based on an inadequate investigation into the details of the employee's speech, or instead on the employer's decision, after fully investigating the matter, to resolve credibility issues against the employee. In either situation, the employer is not motivated by the fact that the employee has engaged in protected speech and therefore has not violated the First Amendment.

2. In our view, a different situation is presented when an employer acts with "willful blindness" to the question of whether an employee's speech is protected. In that case, by analogy to the criminal law, proof that the employer's awareness of a high probability that the speech was protected should suffice to establish the employer's knowledge of the protected status of the speech and provide a basis for inferring that

the protected speech was a motivating factor in the employee's discharge.

II. The court of appeals further erred in holding that the individual petitioners do not have qualified immunity. That holding was based on the court's mistaken view that public employers have a duty to investigate the details of an employee's speech, even if they believe that the spech was insubordinate and involved a purely personal matter. No such duty existed, much less was clearly established, at the time the individual petitioners took the alleged actions upon which respondents' claims were based.

ARGUMENT

I. A PUBLIC EMPLOYER DOES NOT VIOLATE THE FIRST AMENDMENT WHEN IT DISCHARGES AN EMPLOYEE BASED ON REPORTS THAT THE EMPLOYEE HAS ENGAGED IN INSUBORDINATE SPEECH ON A PERSONAL MATTER

A. The Court of Appeals Erred in Holding That, In a First Amendment Challenge To The Discharge of a Public Employee, It Is Irrelevant Whether the Employer Knew That the Employee Had Engaged in Protected Speech

1. This Court has made clear that the discharge of a public employee violates the First Amendment only if the discharge was motivated by the fact that the employee engaged in protected speech—*i.e.*, speech that "relat[es] to a[] matter of political, social, or other concern to the community," as distinguished from "matters only of personal interest." *Connick* v. *Myers*, 461 U.S. 138, 146-147 (1983).[2] The Court

[2] The court of appeals held that the cross-training policy that Churchill allegedly discussed in her conversation with Perkins-Graham was a matter of public concern under *Connick*, Pet. App. 10-22, and petitioners do not challenge that holding in this Court, see Pet. 11-12 n.11. We do not take a position on that question, and we believe that, for purposes of this case, this Court may properly assume, without deciding, that the cross-training policy involved a matter of public concern.

has also made clear that a public employee challenging her discharge on First Amendment grounds bears the burden of proof on that issue.

In *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968), the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." (Footnote omitted). That holding was based on the Court's recognition that the public has an interest "in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment" (*id.* at 573), and that "the threat of dismissal from public employment is * * * a potent means of inhibiting speech" (*id.* at 574). Thus, *Pickering* reflects a common-sense understanding that the public interest in robust debate on matters of public importance is threatened only when an employee's speech on such matters forms "the basis" for the employee's discharge. See also *Rankin* v. *McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of em-

ployees' speech."); *Connick*, 461 U.S. at 144-145 ("[i]n * * * the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs").

In *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977), the Court reaffirmed that the discharge of a public employee violates the First Amendment only when the employee proves that the discharge was motivated by the fact that he engaged in protected speech. The Court held that a public school teacher bore the burden of showing "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor'—in the Board's decision not to rehire him." *Id.* at 287, quoting *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-271 & n.21 (1977).

Since *Mt. Healthy*, this Court has continued to emphasize that a public employee must show that the employer was motivated by the fact that the employee engaged in protected speech. In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the Court described *Mt. Healthy* as holding, first, that "the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him" and, second, that "[i]f that burden * * * were carried, the burden would be on the defendant to show * * * that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights." *Id.* at 403; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 249 (1989) (opinion

of Brennan, J., announcing judgment of the Court); *id.* at 259 (White, J., concurring).

2. In light of this Court's uniform precedents, the court of appeals erred in holding that it is irrelevant whether a public employer knows at the time of discharging an employee that the employee has engaged in speech that is protected by the First Amendment. If the employer did not know that the employee was engaged in protected speech, then it could not have been motivated by the fact that she had engaged in protected speech. Accordingly, in order for an employee to meet her burden of proof under *Mt. Healthy*, she must show that the employer knew of the aspects of the speech that are afforded First Amendment protection.[3]

The relevance of the employer's knowledge of the protected aspects of an employee's speech can be illustrated by a variation on the facts of this case. Suppose petitioners had been falsely told that Churchill used obscenities to refer to her supervisors during her conversation with Perkins-Graham. It is clear that petitioners would not have violated the First Amendment if they fired Churchill on account of their mistaken belief that she had used obscenities. Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). In that case, there would be no causal con-

[3] We do not argue that the employer must be shown to have known, as a legal matter, that the speech is afforded First Amendment protection. It is only necessary for the employee to show that the employer knew the aspects of the speech that in turn are found by a court to be protected by the First Amendment. Of course, individual defendants would be entitled to qualified immunity if the asserted First Amendment protection was not clearly established when they took the challenged actions. See pp. 22-24, *infra*.

nection between any protected portion of Churchill's conversation and her discharge. In other words, her protected conduct would not be the "motivating factor" in her discharge. Cf. *Mt. Healthy*, 429 U.S. at 287.

The result should not be different merely because the reports of Churchill's conversation led petitioners to believe that she was engaged in insubordinate speech involving "matters only of personal interest," *Connick*, 461 U.S. at 147, rather than in obscene speech. Although both types of speech may have some degree of protection under the First Amendment, see *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538, 2543 (1992); *Connick*, 461 U.S. at 147, an employee's interest in engaging in either type of speech is outweighed by the government's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Mt. Healthy*, 429 U.S. at 284, quoting *Pickering*, 391 U.S. at 568; see also *Connick*, 461 U.S. at 150 (government employer has an "interest in the effective and efficient fulfillment of its responsibilities to the public"). Because discharges motivated by the employer's belief that an employee has engaged in obscene or insubordinate speech on a personal matter do not "s[eek] to suppress the rights of public employees to participate in public affairs," *Connick* v. *Myers*, 461 U.S. at 144-145, they do not violate the First Amendment.

The court of appeals thus erred in stating that "the point of *Mt. Healthy* is the "protected conduct, rather than the public employer's knowledge of the precise content of the speech." Pet. App. 24-25 (internal quotation marks omitted). Under *Mt. Healthy*, it is not enough for an employee to show "that [her] conduct was constitutionally protected"; she must also

show that "this conduct," and not some other type of conduct or the false report of such conduct, "was a motivating factor" in the employer's decision to discharge her. When, as in this case, the employer claims that it discharged an employee because it believed that the employee had engaged in insubordinate speech on a personal matter, the employee bears the burden of proving that, to the contrary, the employer knew that she engaged in protected speech and fired her because of it.

B. The Court of Appeals Erred in Holding That a Public Employer Has a Duty Under the First Amendment To Investigate the Details of an Employee's Speech

1. The court of appeals stated that "[i]f the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." Pet. App. 25. It is not clear from this statement whether the court believed that an employer can avoid liability if it adequately investigates an employer's speech but fails to discover the protected aspects of the speech. In any event, the court of appeals was mistaken: This Court has never construed the First Amendment to impose such procedural requirements on a public employer. The Court's decisions in this area in fact compel the conclusion that no such procedures are constitutionally mandated.

First, the imposition of procedural requirements upon public employers would conflict with the balancing approach of *Pickering* and its progeny. The balancing test reflects the principle that it is neither "ap-

propriate [n]or feasible" for courts "to attempt to lay down a general standard" for public employers, in light of "the enormous variety of fact situations in which critical statements by * * * public employees may be thought by their superiors * * * to furnish grounds for dismissal." *Pickering*, 391 U.S. at 569; see also *Rankin*, 483 U.S. at 388 ("the very nature of the balancing test * * * make[s] apparent that the [governmental] interest element of the test focuses on the effective functioning of the public employer's enterprise"); *Connick*, 461 U.S. at 150 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."). As this Court explained in *Connick*:

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

461 U.S. at 151, quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (separate opinion of Powell, J.). In sum, this Court has strongly resisted the notion that the First Amendment requires public employers in all cases to follow "general standards" of procedure in dealing with insubordinate employees.

The adoption of such procedures, moreover, would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Con-*

nick, 461 U.S. at 143; see also *Rankin*, 483 U.S. at 384 ("review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions"). In this case, the court of appeals suggested that the "duty to investigate" is triggered whenever a public employer takes action against an employee based on expressive conduct. Pet. App. 25; see also *id.* at 27. Yet most employment disputes, by their nature, involve some expressive conduct by the employees involved, whether the dispute arises in the public or private sector. See *Connick*, 461 U.S. at 149. This Court has made clear, however, that the First Amendment "does not require a grant of immunity for [public] employee grievances not afforded by the First Amendment to those who do not work for the [government]." *Id.* at 147. The court of appeals ignored that teaching to the extent that it adopted a procedural requirement of such broad applicability that "every criticism directed at a public official * * * [c]ould plant the seed of a constitutional case." *Id.* at 149.

The "undesirable consequences" of imposing a duty of investigation are "not necessary to the assurance of [First Amendment] rights." *Mt. Healthy*, 429 U.S. at 287. This Court stated in *Mt. Healthy* that a public employee's First Amendment rights are "sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct [protected by the First Amendment]." 429 U.S. at 285-286. If, as petitioners claim, they discharged Churchill without knowing that she had engaged in protected speech, then Churchill was not placed in a worse position than she would have been

in had she not engaged in the protected speech. Because Churchill would not be entitled to judicial relief under the First Amendment in the latter situation, she is not entitled to it in the former.

In sum, the First Amendment was satisfied in this case as long as petitioners did not discharge Churchill in retaliation for engaging in protected speech. *Mt. Healthy*, 429 U.S. at 283-284. From a First Amendment perspective, it does not matter whether petitioners relied solely on reports that Churchill had engaged in insubordinate, unprotected conduct or, instead, fully investigated the reports—including by interviewing Churchill—and ultimately decided to disbelieve Churchill and to believe the false reports. In either situation, petitioners would not have been motivated by her protected speech, and therefore would not have violated the First Amendment.

2. The court of appeals was apparently concerned that public employers could "avoid liability for violating employees' free-speech rights through deliberate ignorance of the content of the speech." Pet. App. 23. That concern, however, does not justify the judicial creation of a duty to investigate purportedly derived from the First Amendment. In our view, the court's concern is better addressed by analogy to the "willful blindness" (or "deliberate ignorance") principle of criminal law.

The "willful blindness" principle is reflected in the definition of "knowledge" in the Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Model Penal Code § 2.02. This Court relied on that definition, for example, in *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970), to hold that the defendant in that case "knew" that the heroin he possessed came from a foreign country, even if he lacked "specific knowledge of who smuggled his heroin or when or how the smuggling was done," because "he was aware of the 'high probability' " that the heroin came from a foreign country. See also *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); see generally Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990); *United States* v. *Ramsey*, 785 F.2d 184, 189 (7th Cir. 1986) (citing cases).

We believe that the "willful blindness" principle appropriately can be applied to First Amendment challenges by public employees. In accordance with that principle, an employee could meet her burden of proof under *Mt. Healthy* by showing that, in discharging the employee based on reports of her speech, the employer acted with awareness of a high probability that the employee's speech involved a matter of public concern. In that situation, a factfinder would be entitled to infer that the discharge was motivated by the fact that the employee had engaged in protected speech.

We emphasize, however, that such an inference would merely be a permissible, not a mandatory, one. Cf. *St. Mary's Honor Center* v. *Hicks*, No. 92-602 (June 25, 1993). Thus, proof that an employer acted with "willful blindness" to the protected status of an employee's speech would not shift the burden of proof to the employer to show that it was not motivated by the protected nature of the speech. The burden of proof would remain on the employee-plaintiff

throughout the case, consistent with the *Mt. Healthy* requirement that the employee show she was discharged "by reason of" her protected conduct. 429 U.S. at 283.[4]

II. THE INDIVIDUAL PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ALLEGED ROLE IN RESPONDENT CHURCHILL'S DISCHARGE

The court of appeals denied the individual petitioners qualified immunity based on its holding that they had a duty to investigate the details of respondent Churchill's conversation and breached that duty. Pet. App. 26-27. The court recognized that under *Anderson* v. *Creighton*, 483 U.S. 635, 640-641 (1987), courts must inquire whether the lawfulness of an official's conduct is "apparent" in light of "the circumstances with which [the official] was confronted," an inquiry which usually requires "examination of the information possessed by the * * * official[]." Nonetheless, the court of appeals did not feel obliged to conduct such an inquiry here—by considering the information possessed by the individual petitioners at the time of Churchill's discharge—

[4] Moreover, a public employer may be justified in discharging an employee for speech, even if the speech involves a matter of public concern. *Connick*, 461 U.S. at 149-154; see also *Rankin*, 483 U.S. at 388-392. To determine whether the discharge is justified, the court must balance the employee's interest in engaging in the speech against the employer's interest "in promoting the efficiency of the public services it performs through its employees," taking into account "the manner, time, and place of the employee's expression * * * [as well as] the context in which the dispute arose." *Rankin*, 483 U.S. at 388.

because in its view they "failed to conduct a thorough and impartial investigation * * * about the content of the conversation." Pet. App. 26-27. The court accordingly denied immunity based solely on its determination that "a reasonable official should have understood that what he was doing violated the employee's free speech rights if he fired her for speaking out on a matter of public concern." *Id.* at 27 (internal quotation marks and brackets omitted). The court considered it "immaterial that the [individual petitioners] were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." *Ibid.*

The court of appeals erred in departing from the *Anderson* v. *Creighton* framework for analyzing claims of qualified immunity. Indeed, the court committed the same error as did the court of appeals in *Anderson*. In *Anderson*, the Eighth Circuit denied qualified immunity to the defendant police officer on the ground that "the right Anderson was alleged to have violated—the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances—was clearly established." 483 U.S. at 638. In this case, the court of appeals likewise proceeded at a highly abstract level of generality, finding it sufficient to deny qualified immunity that the right of a public employee to speak out on matters of public concern was "clearly established" at the time of Churchill's discharge. This Court rejected such an approach in *Anderson*, observing that it "would destroy 'the balance that [its] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective per-

formance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson*, 483 U.S. at 639, quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984).

The same consideration requires rejection of the court of appeals' approach here, without regard to the correctness of the court of appeals' suggestion that petitioners had a "duty to investigate." Even assuming this Court were now to interpret the First Amendment to impose a "duty to investigate" upon public employers in circumstances such as this, no such duty was "clearly established" (*Anderson*, 483 U.S. at 639, quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) in 1987, when the events in this case occurred.

As we read the record, under the foregoing principles it was not objectively unreasonable for the individual petitioners to act on the basis of the information they had concerning Churchill's conversation. It appears to be undisputed that the information that the individual petitioners possessed concerning Churchill's conversation did not reveal that the conversation involved a matter of public concern. See Pet. App. 22. The information revealed, at most, that Churchill had made "unkind and inappropriate" remarks about petitioner Waters and criticized the way in which the obstetrics department was run. See pp. 2-7, *supra*. Based on that information, a reasonable official could, as a matter of law, have concluded that it was lawful to discharge Churchill for insubordinate speech. Cf. *Anderson*, 483 U.S. at 641. We therefore believe that the individual petitioners are entitled to summary judgment on grounds of qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA L. HERWIG
ROBERT D. KAMENSHINE
Attorneys

AUGUST 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60334